United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-6101

In The

United States Court of Appeals

For The Second Circuit

HERMAN DUARTE,

Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA and UNITED STATES COAST GUARD,

Defendants-Appellees.

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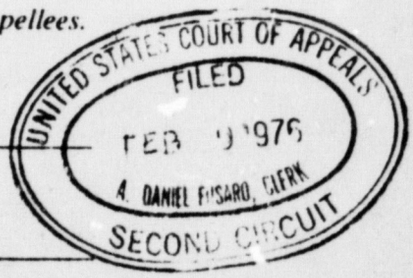

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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-against-

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REPLY BRIEF ON BEHALF OF APPELLANT

I

DUARTE DID NOT VOLUNTARILY WAIVE HIS CONSTITUTIONAL RIGHT TO A HEARING BECAUSE HE WAS NOT ADVISED OF WHAT HIS RIGHTS WOULD BE AT SUCH A HEARING NOR OF THE POSSIBLE CONSEQUENCES OF SAME.

The Government alleges that Mr. Duarte waived his right to a hearing when he signed the voluntary surrender agreement (the "Agreement"). The District Court decided that there was no knowing waiver (52A-53A)* and this decision is unquestionably correct.

A person may, of course, waive the right to a due process hearing provided that the waiver is "voluntary, knowing and intelligently made,..'or an intentional relinquishment or abandonment of a known

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* Except as otherwise indicated all numerical references in parentheses refer to pages in the Joint Appendix

right or privilege'". D.H. Overmyer Co. V. Frick Co., 405 U.S. 174, 186-187 (1972). However, the Courts will "not presume acquiescense in the loss of fundamental rights" Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292, 307 (1973). It is clear from the facts present here that there was no "voluntary" waiver of a due process hearing.

On October 5, 1972 plaintiff, a merchant seaman, was arrested by the Binh Dinh Province National Police of the then Republic of South Vietnam on charges of possession of four marijuana cigarettes. He was incarcerated for eight days among non-English speaking people. On October 14, 1972, one day after his release from jail, while ashore awaiting trial, Commander Darwin W. Newman of the United States Coast Guard spoke with plaintiff and thereafter he signed a Voluntary Surrender Agreement in preference to answering charges of possession of marijuana before the United States Coast Guard. The Agreement provided that plaintiff gave up his right

to title to his document and waived hearing, appeal and review. (CFR 137.10-19(b)(1-3)) Neither Commander Newman nor Chief Petty Officer Cooper, the only Coast Guard officials with whom plaintiff spoke before signing this Agreement, advised plaintiff of what his rights would be if he chose to appear at a hearing nor of the possible outcomes of such a proceeding.

The District Court found that "under the circumstances of the present case, we cannot find a knowing waiver." (54A) The Court based this holding upon the fact that Duarte did not have the advice of counsel even for the charges lodged against him by the South Vietnamese government and that he was not advised of the following: his rights attendant to and the possible consequences of a due process hearing; his entitlement to counsel of his choice at such a hearing; and that the administrative law judge, even if he found plaintiff guilty of marijuana possession, would not be required to deprive plaintiff of his document (54A). These findings are fully

justified by the record and provide ample support for the District Court's refusal to find a voluntary waiver.

The reasoning of the case most clearly in point in this Circuit, Harris v. Smith, 418 F. 2d 899 (2d Cir. 1969) is not contrary to the District Court's findings here. Harris, a seaman, was arrested for possession of marijuana. After the criminal charges arising out of this arrest were dismissed upon application of counsel, the Coast Guard investigated the marijuana incident and interviewed Harris. During the interview Harris was informed that a misconduct charge had been prepared against him and he was shown a copy of the charge.[1] He was advised that, if charged,

1. The present form of Charge Sheet employed by the United States Coast Guard has been in use since May 1968. Harris surrendered his document on May 29, 1968 after being shown a copy of the Charge Sheet. As can be seen from the form appended hereto as Exhibit A, the rights at a hearing are set forth therein. It is fair to presume that Harris was or could have made himself aware of same whereas Mr. Duarte could not as no such charge sheet was ever presented to him.

he would have a right to a hearing and the right to be represented by counsel at the hearing. Harris initially signed a "Voluntary Surrender Agreement" and thereafter sought the return of his document urging that he had a right to counsel at the time of the interview and further had a right to a hearing. The Circuit Court determined that there was no right to counsel at the time of the interview and that due process notice requirements were met since Harris was informed of the matter pending and could choose whether to appear or default.

> "He was also informed that if he were charged, he would have a right to a hearing and the right to be represented by counsel at the hearing." Id. at 900
>
> ....
>
> "Harris chose to waive a hearing concerning the charges after he was informed of his rights to a hearing and the right to be represented by counsel at such a hearing, and signed a statement affecting the waiver and voluntarily submitting his document. Since Harris was informed of the matter pending and could choose for himself whether to appear or default, contest or acquiesce, due process notice requirements were met." Id. at 901

It is clear that this Court's holding in Harris was based upon Harris being advised of his rights including the right to counsel. Duarte was in a foreign war-torn country where access to legal advice was not available to him whereas Harris did have legal counsel on the criminal charges. Duarte, unlike Harris, was not shown a copy of a charge sheet containing a proposed hearing date and setting forth many of his rights. Finally, Duarte was not told that the administrative law judge need not revoke his document even if he found him guilty of possession of marijuana.[2] This did not have to be disclosed to Harris because 46 C.F.R.§137.03-4 which gives judges discretion with respect to the length of any suspension for possession of small amounts of marijuana was not in force

2. 46 C.F.R. 137.03-4 states that "In those cases involving marijuana, where the examiner is satisfied that the use, possession or association was the result of experimentation by the person and that the person has submitted satisfactory evidence that such use will not recur, he may enter an order less than revocation."

at the time Harris was charged.

If plaintiff herein had been formally served with the charges, Coast Guard regulations - 46 C.F.R.§137.05-25(e) - would have required that he be immediately advised of his rights at a hearing and of the possible results of a hearing on those charges. Certainly no less should be required when a seaman is asked to give up his rights to his document without a hearing prior to formal charges being brought.

Since plaintiff was inadequately advised of his rights to and at a hearing, there was no "voluntary" waiver of his right to a hearing. Judge Stewart's decision on this point is fully supported by the facts.

II

THE GRAVAMEN OF THIS ACTION IS A DENIAL OF DUE PROCESS RIGHTS AND NOT A TORTIOUS ACT

Paragraph 9 of the amended complaint alleges that plaintiff was not provided with "complete disclosure of the consequences" of a voluntary surrender "in violation of due process of law." The meaning of this paragraph is made clear[3] by the letter to the Commandant seeking return of plaintiff's document (22A-23A) and from the briefs filed by plaintiff before the District Court in which repeated reference is made to the due process denials inherent in failing to advise plaintiff of his rights at a hearing should he elect to appear at

3. Upon reflection counsel for plaintiff concedes that the paragraph could have been more artfully drafted.

one and in failing to advise him of the possible consequences of a hearing, with particular reference to the fact that even if found guilty the administrative law judge need not revoke his document.

Assuming arguendo that there was no voluntary waiver because plaintiff was entitled to be advised of his rights at a hearing and of the possible consequences thereat, it is incontrovertible that his claim for lost wages is one founded upon the Constitutional denial of due process of law within the meaning of the Tucker Act.

In Cohens v.Virginia, 6 Wheat 264, 5 L.Ed. 257 (1821) Chief Justice Marshall declared that a case "may truly be said to arise under the constitution or a law of the United States whenever its correct decision depends on the construction of either." There is no distinction between the phrase "arise under" and the phrase "founded upon" which appears in the Tucker Act, United States v. Emery Bird, Thayer Realty Co., 237 U.S. 28, 35 (1911). Therefore, a case is founded upon the Constitution if its correct

decision involves a construction of the Constitution. The gravamen of this action is a failure to provide due process of law, a Fifth Amendment right. The correct decision of this action requires a determination of whether due process of law was rendered. Therefore it is a case founded upon the Constitution within the meaning of the Tucker Act.

The Government's attempt to label this action a tort does not convert it into one. In Carriso, Inc. v. United States, 104 F. 2d 707, 712 (9th Cir. 1939) to avoid seizure of his vessels the plaintiff paid custom fees and sued under the Tucker Act to recover the sums exacted. The Government asserted that the fees were exacted tortiously and therefore the District Court lacked jurisdiction. The Circuit Court categorically rejected this claim. Similar assertions were turned aside in Dooley v. United States, 182 U.S. 222 (1901); Clapp v. United States, 117 F.Supp. 576 (Ct. of Claims 1954); and Ross Packing Co. v. United States, 42 F. Supp. 932, 936 (E.D. Wash. 1942). The

reason underlying these decisions is an impatience

> "on the part of Courts when confronted with situations where the Government has the citizen's money in its pocket, and pleads the illegal acts of its officials as an excuse for keeping it there."

Clapp v. United States, supra, at 580.

If, as we believe, Mr. Duarte was deprived of due process of law which prevented him from earning his livelihood at sea, this Court should not countenance the Government's attempt to bar a claim for lost wages by asserting the tortiousness of the acts alleged by plaintiff.

If the Government's assertion that this action "sounds in tort" were adopted it would be difficult to spell out a Tucker Act claim which would not be subject to similar construction. Many Tucker Act cases concern an unlawful seizure and/or forfeiture of property, the return of which or its monetary equivalent is sought. (See cases cited in footnote 1 of the plaintiff-appellant's brief.) In those actions the illegal seizure and forfeiture might easily be said to constitute the tort of wrongful conversion

of the property of another. No Court has, however, so construed these claims. In fact, the Court of Appeals for the Third Circuit in Menkarell v. Bureau of Narcotics, 463 F. 2d 88 (1972) rejected the Government's attempt to apply the two year statute of limitations of the Federal Tort Claims Act rather than the six year statute of the Tucker Act to a suit for the unconstitutional seizure and forfeiture of an automobile allegedly used in the narcotics trade. The Court held that:

> "A suit to recover a vehicle so seized and so forfeited is founded upon a law of Congress to the same extent that a suit to recover duties wrongfully exacted is founded upon a law of Congress." Id. at 91

Similarly, we believe, a suit to recover monetary losses due to an unconstitutional seizure of plaintiff's property, a merchant mariner's document, is founded upon the Constitution to the same extent that a suit to recover a seized vehicle or duties wrongfully exacted is founded upon laws of Congress.

In support of its contention that the instant action sounds in tort, the Government relies heavily upon Dupree v. United States, 136 Ct. Cls. 57, 141 F. Supp. 773 (Ct. of Claims 1956) and its progeny. Dupree, in truth, states no such thing. Rather, it holds that in the specific instance where a hearing was held but a man was denied confrontation with his accusers, it was not possible for the Court to determine whether such a confrontation would have resulted in any change in the decision to deny security clearance. This case is clearly distinguishable. Mr. Duarte was denied any hearing altogether by the unconstitutional taking of his document. When a hearing was subsequently demanded (22A-23A), it was refused (25A-26A). The time for which such a remedy would be meaningful has now long since passed. Thus, here the extent of damages caused by the denial of due process is easily determinable - the loss of wages for the two years during which his document was wrongfully withheld thereby preventing him from seeking and obtaining work aboard United States merchant vessels.

Kanarek v. United States, 161 Ct. Cl. 37, 314 F. 2d 802 (Ct. of Claims 1963), cert. denied 379 U.S. 838 (1964), and Williamson v. United States 166 Ct. Cl. 239 (Ct. of Claims 1964), are security clearance cases which rely upon Dupree, supra. They are also distinguishable from the present case in that the facts of those cases much more closely fit within the traditional definition of inducement of a breach of contract. There the Government's denial of security clearance resulted in the discharge of the employees by their respective employers. In this case plaintiff had no contract with a shipping company beyond the voyage on which he was then engaged and the Government's actions did not result in any employer discharging him. Rather, by taking Mr. Duarte's documents, the Government directly prevented him from seeking employment as a merchant seaman aboard a United States flag vessel.

In addition, Dupree and its progeny, to the extent that they are not distinguishable, are aberrations of the McCarthy era and their precedential value is questionable. Finally, this Court is not bound to

follow Court of Claims decisions.

III

PLAINTIFF'S CLAIM IS "FOUNDED... UPON THE CONSTITUTION" WITHIN THE MEANING OF THE TUCKER ACT

It is quite clear from decided cases that the Tucker Act permits recovery of money damages for a violation of Fifth Amendment rights, whether they be a taking without just compensation, Smith v. United States, 458 F. 2d 1231 (2d Cir. 1972); R. J. Widen Co. v. United States, 357 F. 2d 988 (Ct. of Claims, 1966) - or a denial of due process, Lowther v. United States, 480 F. 2d 1031 (10th Cir. 1973); Jaekel v. United States, 304 F. Supp. 993 (S.D.N.Y. 1969). Plaintiff's claim is for actual money damages caused by what the Court below found to be the wrongful denial of due process in the taking of his seaman's documents, and thus is "founded upon the Constitution" within the meaning

of 28 U.S.C. §1346(a)(2)[4] (See pages 9-10, supra).

This case closely parallels those in which damages have been allowed for a denial of due process. In the oft-cited Jaekel v. United States, supra, plaintiff's automobile was seized pursuant to statute by federal agents in connection with the arrest of plaintiff's daughter on a narcotics charge. The automobile was later sold, also pursuant to statute, without constitutuionally adequate notice having been given to plaintiff. This lack of due process was held to give rise to money damages for the loss of the automobile.

Similarly, in Lowther v. United States, supra and in Menkarell v. Bureau of Narcotics, supra, there were forfeiture proceedings in which the owners of the property involved were not given adequate notice

4. The Government suggests in its brief (P. 17) that plaintiff should be seeking a "due process hearing". The inappropriateness of such relief at this time must be obvious to all concerned.

of the sale. These proceedings, also, were found to violate due process requirements. Money damages for the property - not belated hearings in compliance with due process - were found to be the proper relief under the Tucker Act. Contrary to the Government's assertions, it was the denial of due process in the takings which provided the basis for the award of damages in these cases. This same denial of due process provides the basis for damages in this case.

The Government cites R.J. Widen Co. v. United States, supra at 994, for the proposition that "compensation under the Fifth Amendment may be recovered only for porperty taken and not for incidental or consequential losses." Widen defines "consequential damages" as those which are "'an unintended incident' of the actual taking" Id. at 993. Mr. Duarte's loss of seagoing employment was obviously not "an unintended incident" of the Coast Guard's unconstitutional taking of his seaman's document, but, on the contrary, was the very purpose of the taking.

In American Oil Company v. United States, 383 F. Supp. 1281 (N.D. Okla. 1974) plaintiff was allowed to recover its loss of profits on tires and the loss of rents when its property was seized by the Internal Revenue Service for the debts of its lessee. The value of depreciation of seized automobiles during the period of seizure and post forfeiture was allowed in United States v. One 1965 Chevrolet Impala Convertible, 475 F. 2d 882 (6th Cir. 1973), in addition to the fair market price of the automobiles. Surely it cannot be argued that Mr. Duarte's loss of earnings is more "incidental or consequential" to the taking involved than the elements of damages to which the plaintiffs in these Tucker Act cases were held to be entitled.

As has been shown, the Government's assertion that Mr. Duarte is seeking compensation for "incidental or consequential" damages is totally without foundation.

To the extent that Dupree, Kanerek and Williamson, supra, cannot be distinguished as discussed previously, they are not binding upon this Court and should not be followed.

IV

DAMAGES ARE RECOVERABLE BASED UPON AN ANALYSIS OF BIVENS V. SIX UNKNOWN NAMED AGENTS OF FEDERAL BUREAU OF NARCOTICS, 403 U.S. 388 (1971)

Assuming arguendo that there is no Tucker Act jurisdiction, the plaintiff still has a damage remedy under the Fifth Amendment. In Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) plaintiff sought damages based upon a search and seizure by federal narcotics agents in violation of his Fourth Amendment rights. The Supreme Court held that where a federal agent acting under color of his authority violates a person's right to be secure in his house against an unreasonable search and seizure, a cause of action lies for damages consequent upon such unconstitutional conduct.

> "The question is merely whether petitioner, if he can demonstrate an injury consequent upon the violation by federal agents of his Fourth Amendment rights, is entitled to redress his injury through a particular remedial mechanism normally available in the federal courts.... Having concluded that petitioner's complaint states a cause of action under the Fourth Amendment..., we hold that petitioner is entitled to recover money damages for any injuries he has suffered as a result of the agents' violation of the Amendment" Id. at 397.

The Government's violation of Mr. Duarte's Fifth Amendment rights in this instance is the legal equivalent of the violation of Bivens' Fourth Amendment rights. Since damages are recoverable for a Fourth Amendment violation they should be likewise recoverable for a Fifth Amendment violation.

CONCLUSION

For the reasons set forth herein and in the Appellant's Brief previously submitted, the judgment of the District Court should be reversed.

Respecfully submitted,

Abraham E. Freedman

ABRAHAM E. FREEDMAN

OF COUNSEL

EDWARD M. KATZ

ADDENDUM

46 C.F.R. 137.03-4 states that "In those cases involving marijuana, where the examiner is satisfied that the use, possession or association was the result of experimentation by the person and that the person has submitted satisfactory evidence that such use will not recur, he may enter an order less than revocation."

46 C.F.R. 137.05-25(e) Further, at the time of such service, whether personal or by registered mail, the person charged will be also advised with respect to:

137.05-25(e)(1) The nature of suspension and revocation proceedings and the possible results thereof.

137.05-25(e)(2) His right to have counsel represent him at the hearing, and that counsel may be a lawyer or any other person he desires to represent him.

137.05-25(e)(3) His right to have witnesses and/or records subpenaed in his behalf.

137.05-25(f) If the offense alleged involves mental incompetence, the person charged shall be advised (when the service of the charge and specification and notice of hearing is made) to procure counsel to represent him.

A 201 Affidavit of Service by Mail

LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

HERMAN DUARTE,
Plaintiff- Appellant,

- against -

UNITED STATES OF AMERICA and UNITED STATES COAST GUARD,
Defendants- Appellees.

Index No.

Affidavit of Service by Mail

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, Eugene L. St. Louis *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 1235 Plane Street, Union, N.J. 07083

That on the 9th *day of* Febrary *19* 76, *deponent served the annexed* Reply Brief *upon* William Kantor, John K. Villa *attorney(s) for* *in this action, at* Appellate Section Civil Division, Dept. of Justice, Washington, D.C. 20530 *the address designated by said attorney(s) for that purpose by depositing a true copy of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Depository under the exclusive care and custody of the United States Post Office Department, within the State of New York.*

Sworn to before me, this 9th *day of* Febrary *19* 76.

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977

Eugene L. St. Louis

Print name beneath signature

EUGENE L. ST. LOUIS